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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

CHARLES F. PURVIS,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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January 19, 1981

## QUESTION PRESENTED

Whether to compel the Petitioner, a Quaker, conscientious objector and war tax refuser, to pay federal income tax deficiencies and additions as war taxes causes him to become a party or accessory to a criminal act in violation of International Law, the United States Constitution, the criminal statutes of the United States and his conscience?

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In The

SUPREME COURT OF THE UNITED STATES

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October Term, 1980

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No.

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Charles F. Purvis,

Petitioner,

v.

Commissioner of Internal Revenue,

Respondent,

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

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The petitioner, Charles F. Purvis, respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on October 24, 1980.

## OPINIONS BELOW

The judgment and opinion of the United States Court of Appeals, not yet reported, appears in Appendix II hereto. The judgment and opinion of the United States Tax Court is set forth in T.C. Memo 1978 - 151 and appears in Appendix I hereto.

## JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on October 24, 1980. This Petition is filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. §§ 1254 (1).

## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Articles 1 and 6 of the United States Constitution, 59 U. S. Stat. 1544, 18 U.S.C. Section 960, 28 U.S.C. Section 1254 (1) and Rule 120 of the United States Tax Court Rules of Practice and Procedure.

## STATEMENT OF THE CASE

This Writ arises from the judgment and opinion of the United States Court of Appeals for the Ninth Circuit affirming a decision of the United States Tax Court in favor of respondent against the petitioner (Docket No. 78-2713).

Petitioner is a member of the Religious Society of Friends (Quakers) and is conscientiously opposed to war and its planning, preparation and participation. On the basis of his opposition he refused to pay any taxable income for the years 1970 through 1974. Although he filed income tax returns reporting wages and salaries, he claimed a miscellaneous deduction entitled "war crimes" deduction in an amount equal to the income he reported. This petition arises from the granting of respondent's Motion for Summary Judgment of April 19, 1978. Deficiencies and additions were determined under Sections 6651 (a) and 6653 (a)

of the Internal Revenue Code. Petitioner's reliance on laws higher than the Internal Revenue Code which stem from constitutional and international law was rejected and so he appealed to the United States Court of Appeals for the Ninth Circuit. cf: Egnal v. C.I.R. 396 F. 2d 766.

On October 24, 1980, that court rendered a judgment and opinion affirming Respondent on the basis that "the Nuremberg Principles do not impose liability for the mere payment of taxes." and that 18 U.S.C. Section 960 which petitioner argued would be violated by him if he were forced to pay war taxes "applies only to private war-making." However, the Appeals Court did not address petitioner's arguments in full. It is from that holding that petitioner wishes to present his arguments in full to this court so that the Court of Appeals will be compelled to do the same.

His statement in summing up his case is as follows: He refused to pay war taxes on the basis that the money he is legally required to pay becomes part of a general fund the majority of which is used for the planning and preparation of military enterprises including conventional and nuclear warfare against foreign states with which the United States is at peace.

He contends that if he were to pay those amounts he would in fact be a party or an accessory to a criminal act in violation of Article VI of the United States Constitution, International Law and 18 U.S.C. Section 960.

Several treaties, which are part of the supreme law of the land (Article VI (2) of the United States Constitution) and other international documents which are part of the domestic law of this land prohibit the type of planning and preparation

for military enterprises for which petitioner's money has been spent and is continuing to be spent in ever increasing amounts.

From Petitioner's view, the United States government did not enforce these international and domestic laws against petitioner when he paid his taxes because there is no "overriding compelling interest" for it to do so, because it is equally criminally liable, and is therefore concerned more about war money than it is about just laws prohibiting such activity on the part of both the government and its individual citizens.

Petitioner thus is forced to either be complicitous in U. S. illegal activity or a civilly disobedient citizen. In the face of his government's criminal liability under constitutional and international law, he chooses the latter. Only the highest court in the land can now

vindicate him by protecting his conscience, his citizenship and his constitution by prohibiting the United States Tax Court from forcing him to continue to contribute monies for illegal and criminal purposes.

## ARGUMENT

The decision below as it applies to petitioner, a Quaker, and war tax refuser, causes him to become a party or an accessory to a criminal act in violation of international law, the United States Constitution, the criminal statutes of the United States and his conscience.

I. To compel the petitioner to pay federal income tax deficiencies and additions as war taxes makes him a party or an accessory to a criminal act in violation of international law and Article VI of the United States Constitution.

A. <u>International Law is Applicable to Cases Arising in United States Courts</u>

There can be no doubt that international law is relevant and applicable to cases arising in United States Courts. Article VI, paragraph 2 of the United States Constitution provides that:

> All treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges of every state shall be bound thereby, anything in the Constitution or law of any state to the contrary notwithstanding.

When a question arises concerning whether international law is relevant to a domestic case, it is the duty of the domestic court to determine (1) whether principles of international law are implicated in the case; if so (2) which principles of international law are applicable and (3) whether application of these principles to the case at bar overrides inferior municipal law thus justifying otherwise allegedly illegal conduct.

In the Paquette Habana, 175 U. S. 677, 700 (1900), the Supreme Court declared

that:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.

Accord, Hilton v. Guyot, 159 U.S. 113, 163 (1895). See generally I Whitman International Law § II (1963). International law is applicable to domestic courts. The question is which aspects of international law become "the supreme law" of the land. Treaties made by the President, "and with the advice and consent of the Senate" are obviously included by express provisions of Article II, Section 2 of the United States Constitution. The term "treaty", though not defined in the Constitution, has generally been determined to include "irrespective of their nomenclatures, such international agreements as conventions, pacts, protocols and covenants." Introduction to U. S. Treaties and Other Inter-

national Agreements, Cumulative Index, x (1975) (hereinafter, U.S.T.).

What has been termed "customary international law" is also binding on domestic courts.

> Such customary International Law as is universally recognized or has at any rate received the assent of the United States, and further all international conventions ratified by the United States, are binding upon American courts, even if in conflict with previous American statutory law . . .

II Oppenheim, International Law. 101 (6th ed. 1948). Offenses against the Law of Nations have been sustained in federal courts even if there were no statutes defining the offense under Article I, Section 8, Clause 10 of the U. S. Constitution. Therefore a substantial body of treaties, international agreements, and offenses against the Law of Nations or customary international law are binding on American courts. See Introduction to U.S.T. Cumulative Index, supra, at xi.

B. International Law Prohibits Aggressive Policies of "Defense"

There are many bases for determining that American nuclear weapons are in violation of international law. (Petitioner will present his case against nuclear planning here rather than Viet Nam war crimes because (1) the brevity of the writ requires it (2) the latter has terminated and (3) the former continues to be a basis for the present refusal to pay war taxes for past years. However, much of this argument also applies to the former). Perhaps the most fundamental tenet of all international norms is that a sovereign refrain from use of threat of force in its relations with other countries. This policy has been consistently expressed in various forms as early as 1899 to the present.

In the Convention for the Pacific Settlement of International Disputes, July 29, 1899, 32 Stat. 1779, 1780, T.S. 392 the parties (including the United States) expressed

"a strong desire to concert for the maintenance of the general peace;" to extend "the empire of law;" and to strengthen "the appreciation of international justice . . ." Accord, Convention for the Pacitic Settlement of International Disputes, October 18, 1907, 36 Stat. 2199, 2201, T.S. 536.

Similarly, Article I of the Pan American Anti-war Treaty of Non-aggression and Conciliation, October 10, 1933, 49 Stat. 3363, 3375, T.S. 906, states that the parties "solemnly declare that they condemn wars of aggression in their mutual relations or in those with other states . . ."

The Charter of the United Nations, June 26, 1945, 59 Stat. 1033, T.S. 993 (hereinafter U.N. Charter) is replete with references to the duty to use peaceful means in international relations. The Preamble expresses a determination "to save succeeding generations from the scourge of war . . .";

"to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest . . ." U.N. Charter, 59 Stat. 1033, 1035. Chapter I of the U.N. Charter sets forth the purposes of the United Nations. Because these provisions provide a guiding light in the interpretation of international law, it is important to develop a firm grasp of these basic principles. Article I provides that:

> The Purposes of the United Nations are:
>
> 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
>
> 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

3. (E)ncouraging respect for human rights and for fundamental freedoms for all . . .

U. N. Charter at 1037 (emphasis added).

In Article 2, the members agree to "fulfill in good faith the obligations assumed by them" in the Charter; to "settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered"; to "refrain in their international relations from the threat or use of force . . ." or to act "in any other manner inconsistent with the purposes of the United Nations." U.N. Charter at 1037.

C. International Law Prohibits Specific Planning For and Acts of Aggression

The Hague Convention Respecting the Laws and Customs of War on Land, October 18, 1907, 36 Stat. 2277, T.C. 403 (hereinafter, Hague Conventions), was "inspired by the desire to diminish the evils of war . . ." 36 Stat. at 2279. The Convention declares

that where no specific international regulation addresses a specific course of conduct, that the parties follow "the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience." 36 Stat. at 2280. Article 22 of the Convention provides that "(t)he right of belligerents to adopt means of injuring the enemy are not unlimited." 36 Stat. at 2301. Most importantly, Article 23 provides:

In addition . . . it is especially forbidden:

(a) To employ poison or poisoned weapons;

(b) To kill or wound treacherously . . .;

(c) To employ arms, projectiles, or material calculated to cause unnecessary suffering . . .

36 Stat. at 2301-02.

Article 24 prohibits the bombardment of villages, towns, or cities which are unde-

fended, 36 Stat. at 2302, while Article 27 declares that in sieges or bombardments all necessary steps must be taken to spare buildings dedicated to religion, the arts, science, or caring for the sick and wounded. 36 Stat. at 2303.

The Charter of the International Military Tribunal, August 8, 1945, October 6, 1945, 59 Stat. 1544, E.A.S. 472 ("London Agreement enunciating the Nuremberg Principles") (hereinafter, Nuremberg Charter) outlined violations of international law for which even individual citizens of belligerent nations could be held responsible. Article 6 provides that:

> The following acts, or any of them are crimes . . . for which there shall be individual responsibility:
>
> (a) Crimes Against Peace: namely, planning, preparation . . . of a war of aggression or a war in violation of international treaties, agreements or assurances, or participation in a common plan . . . for the accomplishment of any of the foregoing;

(b) War Crimes: namely violations of the laws and customs of war. Such violations shall include but not be limited to, murder, ill-treatment . . . of civilian populations . . . plunder of public or private property, wanton destruction of cities, towns or villages . . .

(c) Crimes Against Humanity: namely, murder, extermination . . . and other inhuman acts committed against any civilian population before or during the war or persecutions on political, racial or religious grounds in execution of or in connection with any crime . . . whether or not in violation of the domestic law of the country where perpetrated.

Article 7 went on to provide that the "fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility." Charter at 1548.

In 1946 the United States delegation to the United Nations introduced a Resolution before the General Assembly affirming "the Principles of International Law recognized by the Charter of the Nuremberg Tribunal." G.A. Res. 95 (1), U.N. Doc. A/64/Add. 1, at

188 (1947). The Resolution was unanimously adopted by the General Assembly on December 11, 1946. In 1950 the Nuremberg Principles were restated by the International Law Commission. Finally, the United Nations Security Council, by Resolution, condemned acts of "reprisals as incompatible with the Purposes and Principles of the United Nations." G.A. Res. 188, Session XIX, 4/1/1964.

D. United States Policies and Development of Nuclear Weapons are Inconsistent with International Law

There can be no doubt that the actual aggressive use of atomic weapons results in almost total destruction of everything within several miles of the site of the explosion. See United States Department of Defense, The Effects of Nuclear Weapons (1977). The residual effects caused by radiation and radio-active fall-out create long-term illness and death in a manner

analagous to poisoning. See United States Atomic Energy Commission, The Effects of Nuclear Weapons (1957), p. 473.

The indiscriminate and "wanton destruction of cities" which results from the use of nuclear weapons is prima facie proof of war crimes, as defined by Principle VI (b) of the Nuremberg Charter, and of crimes against humanity, as defined by Principle VI (c) of the Charter. Likewise, the poisonous effects of nuclear radiation and fall-out are prima facie violations of the United States' obligations under Article 23 (a) of the Hague Conventions prohibiting the use of "poison or poisonous arms". Additionally, Article 23 (a) of the Hague Conventions of 1899 and 1907, which prohibits the use of "arms, projectiles, or material of a nature to cause superfluous injury", and the Declaration of St. Petersburg of 1868, which declares that "the only legitimate object . . . (of) war is to

weaken the military forces of the enemy", indicate a customary rule of international law prohibiting weapons of indiscriminate destruction such as nuclear weapons.

Moreover, the aggressive use of atomic weapons would directly contradict the express purposes of using best efforts to avoid a nuclear war and negotiate an end to the nuclear arms race. See discussion, infra. And since the radiation-related after effects of nuclear explosions cannot be controlled, the harm to persons and property in neutral countries would constitute an act of aggression against third states. G.A. Res. 3314, Session XXIX, 12/14/74.

The real question is whether current policies and weapons are in violation of international law. To answer this question one must look to the history and facts of nuclear weapons development.

Remembering that the "planning" or "preparation" for war of aggression violates

Article 6 (a) of the Nuremberg Charter; that "use of threat of force" is in violation of several treaties including the U.N. Charter; that the U.N. Charter condemns "situations which might lead to a breach of the peace," U.N. Charter, Art. I, 59 Stat. at 1037, and imposes a duty upon members "to practice tolerance and live together in peace," U.N. Charter, Preamble, at 1035; that the United States has declared an intention "(t)o prevent the use of atomic energy for destructive purposes" and to eliminate nuclear weapons from national arsenals, e.g., Declaration on Atomic Energy, 60 Stat. at 1480. Nuclear Non-proliferation Treaty, 21 U.S.T. at 484-85; and that the United States has promised to work for international peace and security "with the least diversion for armaments of the world's human and economic resources" 21 U.S.T. at 486; U.N. Charter Art. 26, 59 Stat. at 1041; the possession of nuclear weapons for future "first strike"

use is violative of international law. The "official" nuclear policy of this country is one of deterrence or second-strike capability. This concept is aptly explained by Robert Aldridge who for sixteen years worked in Lockheed Corporation's engineering department, designing every submarine-launched ballistic missile bought by the Navy. Aldridge explains:

> Deterrence is the strategic policy under which most of us believe the Pentagon is still operating. It is presented as a defensive measure, of sorts, because it is based on a second-strike response--massive and unacceptable retaliation--which theoretically deters the Soviet Union from attacking us.
>
> Aldridge, The Counterforce Syndrome (1978) (hereinafter Counterforce).

Aldridge goes on to note that to be an effective deterrent, United States retaliatory forces would have to survive the worst conceivable attack and still wreck havoc in the Soviet Union. To this end, land-based ballistic missiles are stored in underground silos. The fact is that

since the late 1960's, both the Soviet Union and the United States have possessed this deterrent capability. Counterforce, at 2. To maintain this "balance" superpowers agreed in S.A.L.T. I (Strategic Arms Limitation Treaty) to refrain from developing elaborate anti-ballistic missiles (ABMs).

There came a time, however, when actual U.S. policy shifted from deterrence to what Aldridge terms "counterforce". In 1973, Aldridge resigned after helping design three generations of Polaris missiles, the multiple individually-targeted reentry vehicles (MIRVs) for Poseidon, and the beginnings of the Trident missile. The cause of Aldridge's resignation was his sense of a shift in nuclear policies:

> At the onset of the Trident program, I discovered the Pentagon's interest in acquiring a precise "counterforce" weapon capable of destroying "hardened" military emplacements such as missile silos. This was a profound shift from a policy of retaliating only when fired upon, because it

does not make sense to attack empty silos (which is all that would be left following an enemy first-strike attack on the United States). Counterforce at vii.

The S.A.L.T. I agreement froze the number of strategic arms, but did not freeze quality improvements--the area of primary U.S. emphasis. Counterforce at 60. The sheer explosive power of these weapons is unimaginable. According to Senator George McGovern, the U.S. presently possesses 8,500 warheads, a combined explosive power of over three billion tons of TNT, which calculates to about 1,500 pounds of explosive for every man, woman and child on the planet. McGovern, "End of the World", Playboy 124, 126 (February, 1978) hereinafter, McGovern). But the magnitude of explosive is not as important as the accuracy of the explosion. Moreover, S.A.L.T. I did not limit the numbers of strategic warheads (as opposed to strategic missiles) and thus since S.A.L.T. I the U.S. has increased its nuclear warhead stockpile from

4,600 to 9,000, while the Soviet Union has increased theirs from 2,000 to 4,000. "The SALT Trap", The Progressive 9 (December 1978).

Additionally, S.A.L.T. I placed no restrictions on production of two weapons systems which have critically affected the arms race: MIRVs and the cruise missile. MIRVing missiles means two to fourteen additional independently targeted warheads to a single missile, giving it the kill potential of many missiles. The cruise missile is a mobile weapon which flies at altitudes below the detective capabilities of radar and which can strike within thirty feet of a target over 2,000 miles distant, according to the Progressive.

The dangers in such policies are legion. For one thing, these developments make it virtually impossible to verify compliance with an arms limitation agreement. Although satellites can count missiles, submarines or airplanes, they cannot determine how many warheads are on a given mis-

sile. McGovern at 196.

The United States has retrofitted accuracy improvement systems and MIRVs to both land and submarine launched missiles. In October 1977 the U.S. retrofitted 550 Minuteman III missiles with the NS-20 guidance system which doubled the accuracy of the 1650 MIRV warheads. This gave each warhead an even chance of landing within 600 feet of any Soviet silo with a blast nine times greater than the Hiroshima bomb. McGovern at 196. Each of the 1,650 Minuteman warheads now has over an 80% chance of destroying any Soviet silo at which it is aimed.

Other weapons systems currently in development pose an even greater threat of the risk of outbreak of nuclear war. Lockheed began work in 1968 on a maneuvering re-entry vehicle (MARV) which permits in-flight alterations in navigation increasing ever-more the accuracy of the hit. In

1970, concept studies were initiated for the Mark 500 MARV for possible use on Trident missiles.

In 1974 the ABM Treaty was modified to allow only 100 defensive interceptors for each country, thus making nonsense of the Pentagon rationale that in-flight maneuverability is essential to evade enemy defense systems.

In 1972 the Missile X program was initiated. The actual implementation of the program began in October, 1977. Under this system five to twenty-five mile trenches will be dug in the Western U.S. Each trench will conceal a missile which can be moved back and forth at random, the assumption being that the Soviets would exhaust their ICBMs trying to "find" the missile. The problem is that the Pentagon scenerio omits to consider the fact "that a 20-megaton burst, such as that produced by a Soviet SS-9 ICBM, would

leave a 75-foot high layer of dirt on the lid if it struck as far as half a mile away. Missile-X would probably be entombed unless it were planned as a first-strike weapon." Counterforce at 27. Moreover, the trench system once again creates insurmountable verification problems since "there would be no way the Soviets could be certain that there was only one missile in any given trench." Counterforce at 27.

The Trident submarine launched missile system is a floating vessel of destruction. The 560 foot long Trident will carry twenty-four submarine launched ballistic missiles (SLCMs) each with a range of 4,000 nautical miles and each equipped with eight 100-kiloton warheads. The proposed modifications of the Trident submarine, or Trident-2, will carry twenty-four Trident-2 missiles, each with a range of 6,000 nautical miles, and each capable of "delivering seventeen super-accurate MARV warheads to within as

few feet of as many targets." Counter-force at 25, 26. As Aldridge describes it:

> One Trident submarine will be able to destroy 408 cities or military targets with a blast five times that which was unleashed over Hiroshima. A fleet of thirty Trident submarines would be able to deliver an unbelievable 12,240 nuclear warheads against an enemy's territory--or 30 times the number originally thought sufficient for strategic deterrence. Clearly, if Trident attains the accuracies the Navy seeks, it will constitute the ultimate first-strike weapon. Counter-force at 26.

Once each nation possesses weapons capable of a first-strike, then the risks of a nuclear war escalate in a geometric progression. The dilemma is that (1) since each is capable of a first-strike which would presumably cripple the other's ability to retaliate, (2) since only 100 ABMs are allowed per side, and (3) since cruise missiles and other systems can penetrate enemy territory undetected by radar, then

each side will be vulnerable to a crippling first-strike attack thus tempting each side to devastate the "enemy" before the "enemy" devastates them. This scenario of mutual nuclear insecurity is only year ahead. Although the United States is ahead of the Soviets in developing a first-strike capability, Counterforce at 59, it is only a matter of time before the Soviets possess an effective first-strike capability. Perhaps, in anticipation of that day, President Carter announced a U.S. first nuclear strike doctrine in his address to the General Assembly of the U.N. from the rostrum of the General Assembly, on October 4, 1977.

> . . . I hereby declare on behalf of the United States that we will not use nuclear weapons except in self-defense; that is, in circumstances of an actual nuclear or conventional attack on the United States, our territories or armed forces, or such an attack on our allies.

New York Times, "Transcript of President Carter's Address to United Nations

General Assembly, Oct. 5, 1977, p. A12.

The doctrine is extremely far-reaching:

(1) It announces that the U.S. "will" use nuclear weapons (he did not say, for example, "might" or "reserves the right" or similar words);

(2) Nuclear weapons would be used also in case of attack by "conventional" weapons;

(3) They would be used also in case of attack by conventional weapons on U.S. forces stationed, flying over, or on the high seas, anywhere in the world--for example, in situations similar to the Pueblo incident.

(4) Mr. Carter did not use the language of Article 51 of the U.N. Charter, which allows individual or collective self-defense only "if an armed attack occurs"; the formulation "in circumstances of an actual attack" is not used in any pertinent international instrument. Implicit in the phrase is that the U.S. might use nuclear weapons also if no armed attack "has occurred", so that it could conceivably cover also preventive use of nuclear weapons.

(5) Since the doctrine announces first use of nuclear weapons regardless of the results (perhaps a U.S. Air Force plane was shot at, but not hit?) and, in any case, severity, duration, and character of the "actual attack", is not discussed, the doctrine violates the general principle of proportionality.

(6) The doctrine does not explicitely state that the nuclear weapons would be used exclusively against the attacking state. Is that omission deliberate? In other words, is it a revival of Secretary of State Dulles' doctrine of "massive retaliation of our own choosing", that is, against a nation which did not attack but which the U.S. would unilaterally hold responsible for the attack?

(7) The doctrine does not say that the attack, to which the U.S. would reply with nuclear weapons, was illegal(If a U.S. bomber or a bomber of any U.S. ally would penetrate the territory of another state, the latter would act legally in shooting it down.)

(8) The doctrine does not refer to the obligation to seek peaceful settlement before taking such enormous steps, which would be in contravention of Article 33 of the U.N. Charter.

(9) This coupled with the authortiy of the President under the 1973 War Powers Act, who is therein allowed to engage in hostilities without declaration of war for a period of 60 to 90 days, violates the Hague Convention No. 3 of 1907.

The American nuclear firepower outlined above provides ample basis for concluding that such systems are violations of international law. (This analysis was formulated by Prof. John H. E. Fried, Former

Special Legal Assistant, U.S. War Crimes Tribunal, Nuremberg.) Dr. Fried, in a recent paper presented to the XIth Congress, International Association of Democratic Jurists in Malta, concluded that a first nuclear strike is forbidden by existing international law because nuclear war (1) has no rational war aim - its aim is destruction, (2) would prevent obedience to fundamental rules concerning the conduct of hostilities, (3) would prevent the carrying out of post battle obligations of belligerents, (4) would make it impossible to respect the rights of neutral states. The danger of accidental unintended nuclear war is paramount, causing the dictates of public conscience to prohibit a first nuclear strike before it takes place. (See also Art. 18, 1, Geneva Convention for the Protection of Civilians in Time of War (1949).

E. International Law Imposes a Duty upon Individual Citizens to Disassociate Themselves from Violations of International Law

Since the Nuremberg principles have become a part of international law, the notion of individual responsibility for war crimes has achieved wide acknowledgment. (See below). Under the Nuremberg Charter, it is no defense to claim one was merely following orders. Nuremberg Charter, supra, Art. 7. Individual responsibility attaches if "a moral choice was possible". Ex Parte Quirin, 317 U.S. 1 (1942).

Professor Falk has found that case law developing during the War Crimes Trials after World War II "established that the zone of individual responsibility for crimes against peace extended well beyond principal policy-making and state leaders." Falk, "The Nuremberg Defense in the Pentagon Papers Case", Crimes of War (Falk,

Kolko & Liften, eds., 1971) 231. See, e.g. "The Ministries Case," XII-XIV, Trials of War Criminals (1952). In the Flick Case, which involved prosecutions of German industrialists, the War Crimes Tribunal stated:

> (I)t is urged that individuals holding no public offices and not representing the state, do not, and should not come within the class of persons criminally responsible for a breach of international law. It is asserted that international law is a matter wholly outside the work, interest, and knowledge of private individuals. The distinction is unsound. International law, as such, binds every citizen just as does ordinary municipal law, . . . The application of international law to individuals is no novelty.
>
> Quoted in II The Law of War: A Documentary History 1284 (L. Friedman ed. 1972) (hereinafter, Friedman).

Furthermore, the Tokyo War Crimes Trial Decision, reprinted in Friedman at 1029, suggests that anyone with knowledge of illegal activity and an opportunity to do something about it is a potential criminal under international law unless the person

takes affirmative measures to prevent the commission of the crimes. (emphasis added).

Under these considerations an individual American citizen is in violation of international law if he or she consents to cooperate with any government which produces, possesses or uses nuclear weapons. (Part of the material included here is from Graber, "The International Law Defense", Pacificus Papers, Vol. 2, No. 5, Colorado Springs, Center on Law and Pacifism, 1980).

F. The Applicability of International Law to Petitioner is Proven

The payment of war taxes to the United States for the years 1970, 1971, 1972 and 1974 would have constituted complicity in the commission of crimes against peace, crimes against humanity, war crimes in Vietnam and in nuclear planning. A moral choice to refuse to be in complicity with the commission of such crimes was available to the petitioner and he exercised

that choice and refused to pay a war tax. On the point of the nature and extent of individual responsibility, the Nuremberg Judgment states: "The very essence of the charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state." 6 F.R.D. 69, 110 (1946).

Fundamental fairness requires that the petitioner be permitted to rely on any argument arising from his accountability under international law. That such a policy extends to the Nuremberg Principles is confirmed by the former Assistant General Counsel for International Affairs of the Department of Defense, who acknowledged that "from an international criminal law point of view . . . the Nuremberg norms are part of our municipal law and may be enforced by our courts." Quoted in Falk, A Global Approach to National

Policy, 112 (1974). However, petitioner has not been given an opportunity to present evidence concerning the questions of fact contained in this writ before any court.

Individual liability is determined on the basis of knowledge of war crimes coupled with inaction. See "The Tokyo War Crimes Trial Decision," II The Law of War: A Documentary History, 1029 (Friedmann ed. 1972). It follows, then, that anyone with knowledge of war crimes and the opportunity to do something about it is potentially criminally liable unless that person takes steps to prevent further commission of the crimes. Even if these principles do not impose an affirmative duty to act, the imposition of criminal liability on persons having knowledge of war crimes must create a right in persons to act in a prudent manner in an effort to halt what they reasonably believe to be

international crimes.

In a due process sense, it is enough that the petitioner reasonably believed that the domestic law was superseded by international law. Because domestic law must be construed in conformity with international law whenever such a construction is possible, Borchard, "The Relation Between International Law and Municipal Law," 27 Va. L. Rev., 137 (1940), it violates due process to subject the petitioner to possible criminal liability for tax deficiency in the face of the contradictory claims on his behavior posed by the domestic and international law. Due process does not permit the imposition of criminal liability for tax deficiency (which is possible under the Internal Revenue Code) for an act intended to terminate complicity in war crimes and its preparation when the act was justified under relevant principles of international law.

In 1946, at Nuremberg, Germany, the United States participated in the prosecutions of persons under principles of international law imposing criminal liability for deference to municipal law when they knew, or should have known, that their government was committing violations of international law. It violates the most basic principles of fundamental fairness and due process for the United States, while continuing to participate in the punishment of persons convicted of violating the Nuremberg Principles, to refuse to acknowledge the right of taxpayer to refuse war taxes in violation of municipal law established by the Nuremberg Military Tribunal.

G. Arguments Invoked Against the Applicability of International Law are Invalid

Usual rebuttals to the international law argument are stated as follows: (1)

"International law does not apply to American courts unless it concerns a treaty not superceded by a statute."

As presented aforesaid, this is not so and moreover in the instant case insofar as the Nuremberg Charter is concerned it has been made part of domestic law by its incorporation in 59 U.S. Stat. 1544. (2) "The provisions of the Nuremberg Charter are strictly limited. Crimes Against Peace only apply to "major" war criminals, and War Crimes and Crimes Against Humanity are limited to wartime." In respect to Crimes Against Peace, petitioner argues that 18 U.S.C. 960 infra makes any person within the United States criminally liable. In respect to War Crimes and Crimes Against Humanity, The Report of the International Law Commission (1950) at Principle VI, paragraph 122 states that "The Tribunal did not, however, exclude the possibility that crimes against humanity might be

considered before a war." Finally, as to all three classes of Nuremberg crimes, the limitation placed upon the jurisdiction of the then court by itself were self-imposed flowing from its discretionary power due to a desire to strictly construe the charges because of the initial use of the Charter, the ex post facto charge against its use, giving the benefit of the doubt to defendants for that reason. The literal words of the Charter do not make such discretion mandatory upon future judges or interpretors as this Court.

International law is progressive. See 2 Mueller, International Criminal Law, (1965) at 263. No such conditions apply 35 years later and individuals such as business men and women, ordinary soldiers or members of war organizations would have been a sufficient status then and now to be

considered an accessory. See II Whitman, Digest of International Law 885-87, 1968. The last paragraph of Article 6 of the Nuremberg Charter concerns complicity and states that ". . . accomplices participating in the formulation . . . of a common plan to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan." See also Mueller at 269. (3) Moreover, the argument is tirelessly repeated that International Law prohibits only the use and not the possession of nuclear arms. But the aforesaid chronology of applicable international law provisions viciates that myth. "First Strike" planning puts the lie to that rebuttal forever. If the law must wait on "use" in this type of case there will be no law or people left to adjudicate. (4) Finally, these arguments are usually rebutted, if all else fails, on the basis that they are political in

nature and non-justiciable. This rebuttal is spurious on its face for this petitioner's plea is a plea much more than political. It is a plea for humanity and against the super-powers of the U.S. and U.S.S.R., lest we find our planet destroyed for want of "legal standing".

Thus the involvement of the United States in Vietnam war crimes and the formulation of current plans which violate international and constitutional law, will make petitioner an accessory to both and criminally liable if he is forced to pay war taxes for said plans and preparations.

II. To compel the petitioner to pay federal income tax deficiencies and additions as war taxes forces him to furnish money for a military enterprise against a foreign state with which the United States is at peace in violation of domestic law at Title 18 U.S.C. Section 960.

Title 18 U.S.C. Section 960, Expedition Against Friendly Nations provides, "Whoever, within the United States, knowingly begins or sets on foot or provides or prepares a means for or furnishes the money for, or takes part in, any military or naval expedition or enterprise to be carried on from thence against a territory or dominion of any foreign prince or state, or of any colony, district or people with whom the United States is at peace, shall be fined not more than $3,000.00 or imprisoned not more than three years or both." June 25, 1948, C. 645. 62 Stat. 745.

The statute is generally construed in the disjunctive. Wiborg v. United States, 163 U.S. 632 (Pa. 1896). That is whoever knowingly begins or sets on foot, or provides, or prepares a means for, or furnishes the money for, or takes part in,

etc., violates the statute. It is an offense against the statute if any one of these factors takes place. Not every proviso must take place for the statute to be violated. For example, if a person within the United States knowingly furnishes the money for any military or naval expedition or enterprise, etc., then he has violated the statute whether he has violated any other of the aforementioned sections.

The essential aspects of the language which apply to the question at issue are as follows: 1) whoever, 2) within the United States, 3) knowingly begins, 4) or furnishes the money, 5) for any military . . . enterprise, 6) to be carried on from thence against a territory or dominion of any foreign . . . state . . . or people with whom the United States is at peace . . ., 7) shall be imprisoned.

1. Whoever. Petitioner is a single individual. A single individual may violate the statute. It does not require more than one person to violate the statute. United States v. Ran Chandra, 254 F. 635 (D.C. Cal. 1917). See also United States v. Burr, 25 Fed. Cas. No. 14, 694A (C.C. Va. 1807). "Any citizen" is sufficient under Charge to Grand Jury, 30 Fed. Cas. No. 18, 264 (C.C. N.Y. 1866). A military enterprise may include various undertakings by single individuals, United States v. Sander, 241 F. 417 (D.C. N.Y. 1917). This statute does not require that the individual be a policy maker or of any "major" standing in the government.

2. Within the United States. It is a stipulated fact that petitioner resides within the United States.

3. Knowingly begins. Petitioner knowingly paid an income tax of which a large percentage is allocated for military pur-

poses. He therefore knowingly furnished the money for a military enterprise as defined below. He caused this activity and then became subject to civil charges brought by the Internal Revenue Service. (See Wiborg v. United States, 163 U.S. 632 (1896) for the Court's discussion of the state of mind for awareness of criminality, pp. 1136-37.)

4. Or furnishes the money. Taxpayer furnished the money by means of the payment of his income tax for a large percentage of which goes for military purposes in those years when his money was not withheld. He would violate this section again if compelled to pay war taxes by this Court. The furnishing of tax money is the beginning of an enterprise. Charge to Grand Jury, Neutrality Laws, Fed. Cas. No. 18, 267 (C.C. Ohio 1851). The overt act is not the invasion of a foreign country but the furnishing of tax money. Charge to

Grand Jury, Neutrality Laws, Fed. Cas. No. 18, 266 (C.C. Ind. 1851).

5. For any military enterprise. It is not necessary to warrant a conviction that there shall be at any time in existence a military expedition or enterprise but it is sufficient if a military enterprise is part of the intent of he who is engaged in doing of the things prohibited. Jacobson v. United States, 272 F. 399 (C.C.A. Ill. 1921) cert. den. 256 U.S. 703. Any tax money which tends to form or give assistance to those engaged in a military enterprise is within the statute's power. United States v. Hughes, 70 F. 972 (D.C.S.C. 1895). It is not necessary that a military enterprise should actually reach the shores of the country to which it is destined. United States v. Murphy, 84 F. 609 (D.C. Del. 1898). To constitute an offense it is not necessary that the enterprise should start for its destination. United States

v. Ybanez, 53 F. 536 (C.C. Tex. 1892). See also United States v. Chakroberty, 244 F. 287 (D.C. N.Y. 1917); United States v. O'Sullivan, Fed. Cas. No. 15, 975 (D.C. N.Y. 1851). It is not necessary that the act of the petitioner constitutes a complete organization, but it is sufficient if the plan is made in the United States and funds collected here for carrying it out. Jacobson v. United States, 272 F. 399 (C.C.A. Ill. 1962), cert. den. 256 U.S. 703.

6. To be carried on from thence against a territory or dominion or state . . . or people with whom the United States is at peace. The statute applies to warlike enterprises to be carried on from this country directed against friendly powers with which the United States is at peace. United States v. O'Sullivan, Fed. Cas. No. 15, 974 (D.C. N.Y. 1851); United States v. O'Sullivan, Fed. Cas. No. 15, 975 (D.C.

N.Y. 1851). It does not matter whether war is inevitable with the nation or nations towards which the enterprise is directed. United States v. Burr, Fed. Cas. No. 14, 694A (C.C. Va. 1807). It is no defense if the enterprise is commenced with the knowledge and approval of the President of the United States. United States v. Smith, 27 Fed. Cas. No. 16, 342A (C.C. N.Y. 1806) even though the Court of Appeals ruled that it was. And the statute clearly contemplates imprisonment before the act takes place, so that planning and preparation alone make the case.

7. Shall be imprisoned. There are four acts which the statute determines unlawful, either one of which conpletes the crime, 1) to begin, 2) to set on foot, 3) to provide the means, 4) to procure the means. United States v. O'Sullivan, supra. Petitioner contends that he has

violated the third, to provide the means, that is furnishing the money. Further, O"Sullivan also holds that, "The United States observes international law, . . . What a nation may not lawfully do in its public capacity in respect to others, its citizens are not to do in their private capacity." United States v. O'Sullivan, supra.

The United States has maintained that it observes international law. Further, individual citizens may not do what the nation cannot do lawfully. It is the contention of petitioner that the United States has violated international law and the Nuremberg Charter derived therefrom (see Argument I) and therefore he, as a private individual, refuses to violate international law when his country, the United States, may not lawfully do so. Further if there was any question concerning whether petitioner was individually liable because he is not of "major" govern-

mental status, clearly this domestic statute when coupled with international law made part of U.S. law makes him liable solely as an individual taxpayer.

Petitioner contends that by being compelled by the United States to pay war taxes, he violates the statute in question because he knowingly furnishes the money contemplated for a "First Strike" military enterprise against a foreign state with whom the United States is at peace. Because the courts have construed the word "enterprise" to mean less than a full-blown military expedition where boats and arms and planes and munitions are gathered in the United States for an enterprise against a foreign country or people with whom the United States is at peace, an individual such as taxpayer could be interpreted to have violated the statute by simply furnishing the money for a military enterprise against a country or

people with whom the United States is at peace. Petitioners' contention is that the enterprise is itself the collecting of war taxes and the turning of that money into military equipment which is being held as a threat or deterrent against countries or peoples with whom the United States is at peace and which may be used against those countries or peoples with whom the United States is at peace and which may be used against those countries or peoples in the future when and if a war becomes a reality. Some of his war tax money has not been held on a contingency but was actually used in an enterprise against Vietnam by the United States and therefore by him. He finds himself in the position that if he refuses to pay war taxes he is civilly and criminally liable under the Internal Revenue Code. However, if he does furnish war taxes to the United States, he sees himself as criminally liable under international and federal law.

He prefers to be placed in jail for three years in violation of this statute than to provide the money to the United States for its planning and preparation for military enterprises and thus violate international law and his conscience as well.

III. CONCLUSION

If Petitioner is compelled to violate international law, the United States Constitution and the criminal code of the United States, he becomes criminally liable as a party or an accessory to an international and domestic crime.

American military involvement is violative of petitioner's rights and duties under international law and domestic law and Article VI of the U.S. Constitution. Petitioner does not contend that a citizen may as a general rule refuse to pay federal taxes because he or she disagrees with such tax or its purpose.

United States v. Douglass, 476 F. 2d 260 (5th Cir. 1973). He refuses to pay because of the specific purposes for which the government is using the taxes represented by it. Petitioner filed federal income tax returns furnishing fully accurate information and refused to pay that portion which he reasonably estimated would be used for support of war and killing. The petitioner is not contending that Article VI entitles the citizen to refuse part of the tax liability because of disapproval of any governmental "political" action, but that the conscientious objector may not be taxed to support the carrying on of war which, unlike any other governmental activity, directly involves the mass killing of human beings, cf. Crowe v. Commissioner, 396 F. 2d 766 (8th Cir. 1968) and transcends strictly "political" consideration.

The petitioner maintains that crimes against peace include planning, preparation, and the initiation or waging of a war of agression, or a war in violation of international treaties and agreements. The United States government spends general fund money in planning and preparation for a wide variety of possible military options, including wars of aggression and wars in violation of international treaties. Therefore, the petitioner is a party to a criminal act under international law as recognized by Article VI of the United States Constitution if he pays taxes which go into a fund part of which was and continues to be used for such purposes. That this government will not prosecute its citizens for complicity in its illegal international acts or that no international tribunal is presently instituted to do so does not vitiate the fact

that the moral choice exists, taxpayers are individually responsible and that criminal, constitutional and international law make this so.

In summary, and for all of the reasons set forth above, the petitioner seeks reversal of the decision of the Tax Court in favor of Commissioner and requests this Court to deny the deficiencies and additions assessed on the basis of the facts presented and the Constitutional issues raised. In the alternative the petitioner requests this Court to remand these matters to the Tax Court for a full hearing on the facts and issues of law and whatever other relief this Court deems necessary in the interest of justice.

Respectfully submitted,

William R. Durland
Attorney for Petitioner

# APPENDIX I

T.C. Memo. 1978-151

UNITED STATES TAX COURT

CHARLES F. PURVIS, Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 10183-76. Filed April 19, 1978.

Charles F. Purvis, pro se.

Gary C. Gough, for respondent.

MEMORANDUM OPINION

SCOTT, Judge: This case is before us on respondent's Motion for Partial Summary Judgment with respect to the deficiencies determined and is fully stipulated with respect to the additions to tax determined.

Respondent determined deficiencies in petitioner's income tax and additions to tax

for the calendar years and in the amounts as follows:

| Calendar Year | Deficiencies | Additions to Tax, I.R.C. 1954[1] Sec. 6651(a) | Sec. 6653(a) |
|---|---|---|---|
| 1970 | $ 293 | $ 73 | $15 |
| 1971 | 774 | 193 | 39 |
| 1972 | 297 | 67 | 15 |
| 1974 | 9,128 | 55 | 456 |

Petitioner, who resided in Fairbanks, Alaska, at the time he filed his petition in this case, filed his individual Federal income tax returns for the calendar years 1970, 1971, 1972 and 1974 with the Director, Ogden Service Center, Ogden, Utah, on June 4, 1975. On each of these returns petitioner set forth an amount which he reported as wages or salaries but showed no taxable income and no income tax due because of claiming in each year as a miscellaneous deduction an amount which he denominated as "War Crimes Deduction" in an amount approxi-

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1 All statutory references are to the Internal Revenue Code of 1954, as amended.

mately equal to the income which he reported. Petitioner in his petition alleged that it was his sincere conviction that he incurred no tax liability for the years here in issue since he was resisting Federal taxes in compliance with international law. He alleged that respondent should be directed to refund to him all amounts withheld from his wages against his will "while the Vietnam War was in progress" or otherwise it became a matter for an International Tribunal to decide his guilt or innocence.

At the time of the trial, pursuant to leave granted, petitioner amended his petition to allege that payment of his taxes would be in violation of the provisions of Title 18, U.S.C., sec. 960, which prohibits individual military expeditions against foreign countries or people with whom the United States is

at peace.[2] At the trial, there was received as part of petitioner's argument a statement, which he had signed, under a heading "Taxpayers for International Law and Order" purportedly confessing as a citizen of the United States crimes against peace, against humanity and war crimes and accepting a share of the responsibility for actions in Vietnam because of having "contributed our fair share of the one hundred fifty billion dollars used to prosecute and (sic) undeclared war."

Respondent, in his notice of deficiency, disallowed in full petitioner's

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[2] Tit. 18, U.S.C. §§960, states:

Expedition against friendly nation.--Whoever, within the United States, knowingly begins or sets on foot or provides or prepares a means for or furnishes the money for, or takes part in, any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace, shall be fined not more than $3,000 or imprisoned not more than three years, or both.

claimed "War Crimes Deduction" and redetermined petitioner's tax accordingly. Respondent further determined that petitioner was liable for the additions to tax under section 6651(a) since his returns were not timely filed, and the additions to tax under section 6653(a) since the underpayment of tax was due to intentional disregard of rules and regulations.

With respect to petitioner's claimed war crimes deduction, he has raised no issues that were not thoroughly considered and disposed of by this Court in Scheide v. Commissioner, 65 T.C. 455 (1975); Egnal v. Commissioner, 65 T.C. 255 (1975); Russell v. Commissioner, 60 T.C. 942 (1973). For the reasons set forth in detail in the above-cited cases, we conclude that respondent properly disallowed the war crimes deductions claimed by petitioner in each of the years here in issue.

Petitioner's reliance on the provisions

of section 960 of Title 18 of the U.S. Code is equally misplaced. Petitioner, by payment of taxes, would not be the person making the decision as to the use of those taxes and, therefore, clearly payment of taxes, however those taxes might be used by Congressional appropriation, would not fall within the provisions of section 960 of Title 18, U.S.C., of furnishing money for a military or naval expedition against a foreign country or people with whom the United States is at peace.

UNITED STATES TAX COURT

Washington, D.C. 20217

CHARLES F. PURVIS,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

Docket No. 10183-76

ORDER AND DECISION

Pursuant to the determination of the Court as set forth in its Memorandum Opinion filed April 19, 1978, it is

ORDERED: That respondent's Motion for Partial Summary Judgment filed January 5, 1978, is granted; and it is further

ORDERED AND DECIDED: That there are deficiencies in income tax and additions to tax due from the petitioner for the calendar years 1970, 1971, 1972, and 1974 in the following amounts:

| Calendar Year | Deficiencies in Income Tax | Additions to Tax, I.R.C. 1954 Sec. 6651(a) | Additions to Tax, I.R.C. 1954 Sec. 6653(a) |
|---|---|---|---|
| 1970 | $ 293 | $ 73 | $ 15 |
| 1971 | 774 | 193 | 39 |
| 1972 | 297 | 67 | 15 |
| 1974 | 9,128 | 55 | 456 |

(Signed) IRENE F. SCOTT
Judge

Entered: April 20, 1978

## APPENDIX II

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| CHARLES F. PURVIS,<br>Petitioner-Appellant,<br><br>vs.<br><br>COMMISSIONER OF INTERNAL REVENUE,<br>Respondent-Appellee. | ) | No. 78-2713<br><br>DC. # 10183-76<br><br>MEMORANDUM |

Appeal from the Tax Court of the United States. Irene F. Scott, Tax Court Judge, Presiding. Submitted: October 6, 1980

Before: FARRIS, PREGERSON, and NELSON, Circuit Judges.

Purvis appeals from the Tax Court's grant of summary judgment in favor of the Commissioner. He argues that the Internal Revenue Code's failure to provide a "war crimes deduction" requires him to violate the Nuremberg Principles, and thus, Article VI of the Constitution which makes duly ratified treaties the supreme law of the land. The Tax Court properly denied Purvis's claim

because the Nuremberg Principles do not impose liability for the mere payment of taxes. Egnal v. Commissioner, 65 T.C. 255, 260-62 (1975).

Purvis also argues that paying his taxes requires him to violate 18 U.S.C. ss 960. This statute applies only to private war-making, not to the payment of taxes to support a war funded by Congressional appropriations. Wiborg v. United States, 163 U.S. 632 (1896).

AFFIRMED.

Filed: October 24, 1980

No. 80-1219

FILED
FEB 19 1981
ALEXANDER L. STEVAS
CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1980

CHARLES F. PURVIS, PETITIONER

*v.*

COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

# In the Supreme Court of the United States

OCTOBER TERM, 1980

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No. 80-1219

CHARLES F. PURVIS, PETITIONER

*v.*

COMMISSIONER OF INTERNAL REVENUE

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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The question presented in this federal income tax case is whether petitioner, who claims to be a pacifist, is entitled to a "war crimes deduction" in computing his income tax. Petitioner contends that under Article VI of the United States Constitution, a taxpayer may refuse to pay taxes if those taxes may be used for military purposes and if the taxpayer considers the military action or preparations of the United States to be in violation of international law. In addition, petitioner alleges that the payment of federal income taxes forces him to furnish money for a military enterprise in violation of 18 U.S.C. 960.[1] The pertinent facts

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[1] 18 U.S.C. 960, provides as follows:

*Expedition against friendly nation*

Whoever, within the United States, knowingly begins or sets on foot or provides or prepares a means for or furnishes the money for, or takes part in, any military or naval expedition or

are as follows: During the years in issue (1970-1972 and 1974), petitioner reported wages on his federal income tax returns, but he showed no taxable income or income tax due. Each year he claimed a "war crimes deduction" equal to the income he reported. On audit, the Commissioner of Internal Revenue disallowed these deductions and determined deficiencies in the amounts of $293, $774, $297 and $9,128 for 1970, 1971, 1972 and 1974, respectively. The Commissioner also imposed penalties for each year under Sections 6651(a) and 6653(a) of the Internal Revenue Code of 1954 (26 U.S.C.), for failure to file timely returns and for underpayment of taxes due to negligence or intentional disregard of rules and regulations (Pet. App. 2a).

In his petition filed in the Tax Court, petitioner alleged that it was his sincere conviction that he incurred no tax liability for the years in issue because he was resisting federal taxes in compliance with international law. He requested that the Commissioner be directed to refund to him all amounts withheld from his wages against his will while the Vietnam War was in progress. At the time of trial, petitioner amended his petition to allege that payment of his taxes would cause him to violate 18 U.S.C. 960, which prohibits individual military expeditions against foreign countries or people with whom the United States is at peace (Pet. App. 3a-4a). The Tax Court upheld the Commissioner (Pet. App. 1a) and the court of appeals affirmed[2] (Pet. App. 9a).

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enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace, shall be fined not more than $3,000 or imprisoned not more than three years, or both.

[2]The payment of taxes for military purposes has been frequently challenged on the ground that such a use violates the taxpayer's First Amendment right to freedom of religion in instances where the taxpayer objects to war on religious principles. That argument, however, has been repeatedly rejected. See, *e.g.*, *Lull* v. *Commissioner*, 602 F. 2d

Petitioner asserts (Pet. 7) that his taxes contribute to the support of military actions and preparations[3] in violation of international law. But it is well established that deductions are a matter of legislative grace. *New Colonial Ice Co.* v. *Helvering*, 292 U.S. 435, 440 (1934). Unless Congress makes express provision for a deduction, it is not allowable. *Deputy* v. *du Pont*, 308 U.S. 488, 493 (1940). The burden of clearly showing the right to the claimed deduction is on the taxpayer. *Interstate Transit Lines* v. *Commissioner*, 319 U.S. 590, 593 (1943). There is no provision in the Internal Revenue Code for a "war crimes deduction" and consequently, no such deduction is allowable.

Moreover, the act of paying taxes neither amounts to complicity in any war crime that petitioner may believe to have been committed by the United States nor renders petitioner a participant in a conspiracy to commit crimes against peace. *Egnal* v. *Commissioner*, 65 T.C. 255, 260 (1975). It is clear that with respect to any violation of international law that might have been, or might be, committed by the United States, petitioner is exempted from complicity by his remoteness and lack of direct involvement. Cf. *United States* v. *Malinowski*, 472 F. 2d 850, 856

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1166 (4th Cir. 1979), cert. denied, 444 U.S. 1014 (1980); *Autenrieth* v. *Cullen*, 418 F. 2d 586 (9th Cir. 1969), cert. denied, 397 U.S. 1036 (1970); *Graves* v. *Commissioner*, 579 F. 2d 392 (6th Cir. 1978); *United States* v. *Haworth*, 386 F. Supp. 1099 (S.D. N.Y. 1974). Petitioner does not rely on the First Amendment in advancing his argument.

[3]Instead of attacking the legality of the Vietnam military action, petitioner now directs his argument against the nuclear armaments policy of the United States. Petitioner states in his petition (Pet. 11) that he "will present his case against nuclear planning here rather than Viet Nam war crimes * * *."

n.7 (3d Cir.), cert. denied, 411 U.S. 970 (1973); *United States* v. *Valentine*, 288 F. Supp. 957, 986-987 (D.P.R. 1968).[4]

Petitioner further argues (Pet. 44-55) that payment of his taxes would violate 18 U.S.C. 960, which provides that the knowing preparation for, or participation in, a military expedition against any nation with which the United States is at peace is a criminal offense. The statute is clearly directed to instances where individuals instigate military action without the sanction of the United States. *Wiborg* v. *United States*, 163 U.S. 632 (1896). Surely Congress never intended to subject persons to liability under Section 960 for merely paying their lawfully due taxes.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
*Solicitor General*

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[4]These is no basis for petitioner's reliance (Pet. 34-40) on the so-called "Nuremberg Principles." It has been consistently held that the "Nuremberg Principles" furnish no basis for refusing to pay income taxes. *Farmer* v. *Rountree*, 149 F. Supp. 327 (M.D. Tenn. 1956), aff'd per curiam, 252 F. 2d 490 (6th Cir.), cert. denied, 357 U.S. 906 (1958); *Anthony* v. *Commissioner*, 66 T.C. 367 (1976), aff'd, 566 F. 2d 1168 (3d Cir. 1977), cert. denied, 436 U.S. 904 (1978); *Greenberg* v. *Commissioner*, 73 T.C. 806, 810 (1980); *Egnal* v. *Commissioner*, 65 T.C. 255 (1975); *Scheide* v. *Commissioner*, 65 T.C. 455, 458 (1975); *Russell* v. *Commissioner*, 60 T.C. 942 (1973); *Muste* v. *Commissioner*, 35 T.C. 913, 920 (1961); cf. *United States* v. *Malinowski*, 472 F. 2d 850, 856 (3d Cir.), cert. denied, 411 U.S. 970 (1973).